



Convention on the Rights of the Child

Committee on the Rights of the Child

Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 13/2017 * , **

*Communication submitted by:*J.S.H.R.

*Alleged victims:*L.H.L. and A.H.L.

*State party:*Spain

*Date of communication:*20 September 2016

*Date of adoption of the decision:*15 May 2019

*Subject matter:*Removal of children from Switzerland to Spain without the father's consent; right to maintain personal relations and direct contact with the father

*Procedural issues:*Abuse of rights; lack of consent of the children

*Articles of the Convention:*2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 16, 18, 19, 27 and 35

*Articles of the Optional Protocol:*5 (2) and 7 (c) and (f)

1.1The author of the communication is J.S.H.R., a Spanish citizen born on 14 April 1969. The author submits this communication on behalf of his daughter, L.H.L., born on 21 October 2000, and his son, A.H.L., born on 7 August 2003, both Spanish nationals. He claims that his children are victims of violations of articles 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 16, 18, 19, 27 and 35 of the Convention. The author is not represented by counsel. The Optional Protocol entered into force for the State party on 14 April 2014.

1.2Pursuant to article 6 of the Optional Protocol, on 28 March 2017, the Working Group on Communications, acting on behalf of the Committee, requested the State party to urgently identify and report to the Committee on the whereabouts of the children L.H.L. and A.H.L.

1.3On 19 October 2017, the Working Group on Communications, acting on behalf of the Committee, decided to reject the State party's request to consider the admissibility and merits of the communication separately.

The facts as submitted by the author

2.1In 2004, the author, his then wife and their two children, L.H.L. and A.H.L., moved from Spain to Switzerland. At the time, L. was 3 years old and A. 7 months old.

2.2In October 2008, the author and his wife de facto separated and submitted an agreement regulating their separation, which provided for shared custody, to the Justice of the Peace in Uster, Switzerland. Consequently, the author moved from the house where he had been living with his family to a nearby apartment in order to be able to continue visiting his children, who remained in the house with their mother.

2.3On 11 June 2009, the Uster Family Court issued a legal separation order between the author and his wife. The Court ordered shared parental authority and granted full custody of the children to the mother; it granted extended access rights to the father (two weekends per month, every Wednesday and half of the school holidays) and ordered him to pay maintenance of 3,500 Swiss francs per month.

2.4On 26 April 2010, Uster District Court rejected the author's custody application and reduced the maintenance payment to 2,500 Swiss francs on the grounds that the author was unemployed. The Court also ruled that the mother should remain in Switzerland with the children until a final decision on divorce and parental authority was reached.

2.5On 11 October 2010, the author and his wife filed a joint petition for divorce in Switzerland and both were summoned to appear on 13 December 2010 for the divorce hearing. On 3 December 2010, the author's wife informed the Swiss court that she had changed her mind about the divorce. As a result, on 8 December 2010, Uster District Court denied the joint petition for divorce.

2.6On 2 December 2010, the author's then wife filed for a contested divorce before the court in Zaragoza, Spain.

2.7On 4 December 2010, the author's wife travelled from Switzerland to Spain with their two children without informing him or obtaining his consent. At that time, L. was 10 years old and A. was 7 years old. On 6 December 2010, his wife explained to the author in an email that she would not be returning to Switzerland, that she wanted to rebuild her life in

Spain, that she had initiated divorce proceedings in Spain and that she wished to maintain the relationship between the children and the author. In particular, she stated: "I am not kidnapping my children. I have legal custody of my children and can decide where they should live. Especially because this is what they want." The author claims that this email demonstrates his wife's premeditation in abducting the children.

2.8 On 7 December 2010, the author submitted an application to the Swiss central authority for the return of his two minor children under the Hague Convention on the Civil Aspects of International Child Abduction, which was forwarded to the central authority in Spain.

2.9 On 19 July 2011, Zaragoza Family Court of First Instance No. 6 declared the removal of the author's children from Switzerland to Spain to be unlawful and ordered that they be returned to Switzerland, in accordance with the Hague Convention. The author's wife appealed the decision. On 11 October 2011, the Second Section of the Zaragoza Provincial Court upheld the appeal. In its decision, the Court concluded that the removal of the children was lawful because, in order for it to be wrongful under article 3 of the Hague Convention, there must be a breach of custody rights, whereas in the case in question the mother had custody of the children, irrespective of the fact that parental authority was shared. It also added that the children had reportedly stated that they did not want to return to Switzerland and interpreted the Uster Court's decision that the mother should not leave Switzerland (see paragraph 2.4) as voluntary rather than compulsory in nature, since she had full custody of the children. The decision denied the return of the children to Switzerland.

2.10 In parallel, on 23 July 2011, the author's wife filed a complaint against him for child abuse (offence of mild verbal abuse). On 13 March 2012, the Spanish court of investigation acquitted the author of the complaint, considering it to be absolutely unfounded for lack of evidence.

2.11 On 23 November 2011, the author filed an application for *amparo* with the Spanish Constitutional Court against the decision of 11 October 2011 of the Zaragoza Provincial Court refusing to return his children to Switzerland. In 2013, the Constitutional Court rejected the application for *amparo*. The author claims that he was not notified of the decision and that he was only informed of it by telephone in January 2016.

2.12 On 8 May 2012, Court of First Instance No. 3 of El Escorial, Spain, established shared parental authority, full custody for the mother and access rights for the father (two weekends a month, half of the holidays and a daily 15-minute telephone or Skype call). The Court also ordered the author to pay maintenance of 1,500 euros per month and ordered the parents to notify the Court in the event of a change of address.

2.13 The author applied to Court of First Instance No. 3 of El Escorial 10 times for enforcement of the judicial decision of 8 May 2012 concerning his access rights. In his applications to the Court, the author claimed that the mother had prevented him from visiting his children on several of the agreed weekends and made it impossible for him to take his children on holidays on some dates over Christmas and during school breaks and to have daily telephone conversations with them, arguing that they did not want to see or have any contact with him. The author claims not to have received any response from the Court in relation to his requests for enforcement of his access rights.

2.14 On 6 November 2012, the author filed a criminal complaint for child abuse against his wife's partner based on his children's reports.

2.15 On 11 September 2013, Court of First Instance No. 3 of El Escorial delivered a ruling declaring the dissolution of the author's marriage by contested divorce. The Court established shared parental authority, full custody for the mother and access rights for the author, ordering him to pay maintenance of 1,400 euros per month.

2.16 In September 2013, the author moved from Switzerland to Ukraine, where his brother lived with his family. In 2014, the author found a job in Kyiv and remarried.

2.17 The author claims that, since January 2015, he has not seen or had any contact with his children and he does not know their whereabouts.

2.18 On 8 September 2016, the Court of El Escorial ordered the mother to notify it of the children's whereabouts and address and to submit their psychological and school reports.

2.19 In December 2016, the author applied to the El Escorial Court to be able to spend the Christmas holidays with his children in Kyiv; he claims not to have received a reply.

The complaint

3.1 The author claims that the State party has violated articles 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 16, 18, 19, 27 and 35 of the Convention.

3.2 The author claims that, by denying the return of his children to Switzerland and declaring their removal to Spain lawful, the Second Section of the Zaragoza Provincial Court "legalized the abduction of his children", without regard for their best interests. He argues that the decision only took into account the mother's interests, as she had full custody of the children, albeit temporarily until the divorce was finalized. He adds that the removal of his children from Spain to Switzerland on 4 December 2010 was unlawful and contrary to the decision of the District Court of Uster, Switzerland, of 26 April 2011, which ordered the mother not to leave Switzerland until a final decision on divorce and parental authority was reached.

3.3 The author points out that his children were 3 years old and 7 months old when the whole family moved to Switzerland in 2004 and that they were 10 and 7 years old when their mother took them back to Spain in 2010. The author argues that, after six years, Switzerland was his children's habitual place of residence, the place where they had spent their childhood and developed solid roots and where they were perfectly integrated into the local school and spoke the German language. He also alleges that the move to Spain cut off the strong relationship and direct personal contact between the author and his children. In particular, the author refers to the forensic psychological report he requested and submitted to the Court of El Escorial in the contested divorce proceedings, in which it is found that the mother took a decision on the removal of the children to Spain unilaterally, without considering how this decision might affect the children's future. The expert also

points out that the potential for the children's growth and development was greater in Switzerland and that this was not taken into account at any time.

3.4The author claims that the State party prevented his access to and contact with his children because of its failure to enforce his access rights and the lack of a judicial response to his repeated requests for the El Escorial Court to execute and enforce the judicial decision of 8 May 2012.

3.5The author claims that the State party did not facilitate his access to and contact with his children given that he has not known their whereabouts since January 2015 and has not seen them for almost two years.

3.6The author requests that, given the inaction of the Spanish authorities, the State party be required immediately to locate his children and inform him of their whereabouts.

State party's observations on admissibility

4.1In its observations of 24 May 2017, the State party argues that the author presents "a different reality" from the situation that emerged from the request for information from various Spanish courts.

4.2With regard to the facts, the State party submits that the criminal proceedings initiated against the mother's partner (see paragraph 2.14) were discontinued because no child abuse had taken place. The applications concerning the enforcement of decisions in relation to alleged breaches of access rights were also dismissed. In August 2013, the author's then wife filed a complaint against the children's paternal grandmother for unreasonably withholding their passports, at the author's request, after the summer holidays in Zurich, Switzerland, that same year.

4.3The State party submits that, in September 2013, the author's then wife filed a criminal complaint against him for the offence of family abandonment for non-payment of maintenance over a period of two years. The State party adds that, in view of the author's failure to appear in court for those proceedings, on 9 July 2015 Court of Investigation No. 6 of Zaragoza ordered the author's judicial detention in order to obtain his statement and that the outcome of the letters rogatory sent to Ukraine in April 2015 to obtain the author's statement is pending, as the documentation transmitted by that country has not yet been translated into Spanish.

4.4With regard to the author's claims concerning the alleged abduction of his children, the State party submits that the Spanish authorities have already taken a position on the matter and that there was no abduction of any kind. The State party refers to the decision of 31 May 2011 to stay proceedings issued in favour of the mother in relation to the criminal complaint filed by the author against her for the offence of abduction of minors.

4.5The State party requests that the present communication be declared inadmissible, in accordance with article 7 (c) and (f) of the Optional Protocol and rule 20 of the Committee's rules of procedure under the Optional Protocol, as it constitutes an abuse of the right of submission because the author does not have custody of his children, nor has he provided evidence that the children have consented to his submitting the communication on their behalf, and as it is manifestly ill-founded. It also requests that the admissibility and merits be examined separately.

4.6Lastly, the State party maintains that the whereabouts of the author's children are not unknown because, according to a report of 16 May 2017 by Court of Investigation No. 6 of Zaragoza, where the criminal complaint against the author for family abandonment was processed, the children's mother does have a known address in Zaragoza.

Author's comments on the State party's observations on admissibility

5.1In his comments of 6, 10 and 19 June 2017, the author reiterates the facts and allegations already made in his initial submission and maintains that the State party's interpretation of the situation is biased. The author alleges that he did not appear to testify in the criminal case against him for family abandonment because the Court had previously refused to provide him with documentation on the investigation and charges in that case.

5.2The author argues that basing the inadmissibility of the communication on the fact that the mother has custody of the children is a "crude" argument on the part of the State party. The author claims that he has shared parental authority over his children and this gives him the right to represent them in any matter without their consent, as they are not of legal age. He adds that the purpose of this communication is not to clarify who has custody of the children, but rather to complain about alleged violations of the Convention by the State party.

5.3The author alleges that, since the mother of his children had withdrawn from the joint divorce proceedings in Switzerland on 3 December 2010 (see paragraph 2.5), the situation had reverted to the one that had existed before the Uster Court judgment of June 2009. The author maintains that the removal of his children from Switzerland to Spain without his authorization constitutes international child abduction, because at that time the author and the mother had joint custody, the latter having withdrawn from the joint divorce proceedings in Switzerland by which she had been granted custody in the first place. He adds that the mother did not inform the Swiss court that she had initiated new contested divorce proceedings in Spain, which constitutes an abuse of rights. According to the author, even if it is considered that the mother had custody of the children on 4 December 2010 in accordance with the decision of the Uster Court, she was obliged to comply with that Court's order not to leave Switzerland until there was a final decision on divorce, parental authority and custody of the children. The author therefore claims that the order not to leave Switzerland was part of his rights of custody for the purposes of the Hague Convention, which were breached by the unlawful removal of his children on 4 December 2010. The author maintains that this was not taken into account by the Second Section of the Zaragoza Provincial Court in its decision of October 2011 (see paragraph 2.11), contrary to his children's best interests.

5.4The author claims that he could not appeal the final divorce settlement of the Court of El Escorial because the Court refused to provide him with the recordings of the judge's interview with his daughter L.

5.5The author contends that the State party has not provided any document proving that all of his applications for enforcement of decisions and enforcement of his access rights before the Court of El Escorial were rejected (see paragraph 4.2). He claims that all his applications for enforcement of decisions have been "forgotten or not decided upon" by the Spanish justice system.

5.6 In relation to the State party's allegations that he failed to pay maintenance, the author confirms that he was unable to pay due to economic hardship and unemployment, as he informed to the relevant authorities. He claims that in June 2016, he requested the Court of El Escorial to forward him the mother's account details so that he could deposit the amount owed, since his economic situation had improved. He adds that he was never given the account details.

5.7 Lastly, the author submits that the address for his children provided by the State party is incorrect. He alleges that it is in fact the address of his ex-wife's parents and that his children have not lived there since 2010. In this connection, the author states that on 6 June 2017, Court of Investigation No. 3 of El Escorial requested the mother to inform it of her actual domicile.

Additional observations from the parties on admissibility

6.1 In its additional observations of 13 July 2017, the State party reiterates its previous arguments on the admissibility of the communication. It states that, on 26 June 2017, the mother filed a document with Court of Investigation No. 3 of El Escorial notifying it of her current and effective domicile, as well as the whereabouts of her children (same address as that provided by the State party in its initial observations). Thus, the Spanish courts are aware of the whereabouts of the author's children, and there has been no abduction.

6.2 The State party contends that there is no evidence that the author communicated his current address to the Zaragoza Court which ordered his arrest for failure to appear in proceedings to do with his non-payment of maintenance for his children. It claims that it is the author whose whereabouts are unknown and who is a fugitive from Spanish justice in order to evade his obligation to pay maintenance.

6.3 In his additional comments of 20 July and 14 August 2017, the author states that the Spanish justice system is corrupt and "feminist" and that it only takes into account the interests of women, especially since the adoption of the Organic Act on Comprehensive Protection Measures against Gender Violence. The author therefore concludes that in all cases of alleged abduction of minors, the Spanish courts will be on the side of the "abducting mother".

6.4 The author refers to the order of 30 June 2017 by which the Public Prosecutor's Office informed Zaragoza Court of Investigation No. 6 of its opposition to the request for provisional detention of the author.

State party's observations on admissibility and the merits

7.1 In its observations of 19 February 2018, the State party reiterates its description of the facts and its allegations on the admissibility of the present communication. It reports that the letters rogatory to Ukraine issued by Court of Investigation No. 6 of Zaragoza to obtain the author's appearance and testimony in the family abandonment proceedings against him were unsuccessful.

7.2 The State party maintains that the author's factual account does not correspond to the real situation, since it does not mention his systematic breaches of the paternal obligations established by judicial decision. It adds that the author's allegations are "full of subjective assessments and attacks on the Kingdom of Spain and the protection of women in Spain, which tarnish their credibility from the outset".

7.3 The State party submits that the author has "randomly linked" his subjective allegations to different articles of the Convention, without including an analysis of the alleged violation committed in relation to each of them. It submits that the author wrongly believes that a State's courts can resolve marital disagreements between children's parents.

7.4 On the merits of the communication, the State party claims to have respected the rights and interests of the children L.H.L. and A.H.L., in accordance with article 2 of the Convention, regardless of whether this was in the interests of the mother or the father. It argues that the author was able to seek the appropriate remedies, all of which were dismissed by the various courts, including the Spanish Constitutional Court.

7.5 The State party argues that, in accordance with its obligations under article 4 of the Convention, when the author stopped paying maintenance for his children, the mother demanded payment of maintenance through civil and criminal channels, which is why the author is currently subject to an arrest warrant for non-payment of maintenance. It adds that, in this way, the Spanish courts have ensured the protection of the children's rights.

7.6 The State party argues that it has respected the rights and duties of the parents to enable the author's children to exercise their rights under the Convention, in accordance with article 5 of the Convention. It contends that the author's allegations concerning his inability to exercise his access rights are due to the fact that he is not in Spain, as he is seeking to evade the arrest warrant against him for non-payment of maintenance. It adds that the author's allegation that Spain affords greater protection to mothers reveals the weakness of the arguments put forward in his communication.

7.7 The State party maintains that the development of L.H.L. and A.H.L. has not been affected, in accordance with article 6 of the Convention and contrary to the author's claim that his children's development would have been better in Switzerland than in Spain. The State party adds that, in the event that children's development has been affected, this would be due purely to the conflict between their parents.

7.8 The State party notes that, in accordance with article 8 of the Convention, L.H.L. and A.H.L. have not been deprived of their nationality, first name and surname, or relations with family members who have wished to visit them in Spain. It submits that the author's allegations that the mother deprived her children of their relationship with their father, whether true or false, should not be the subject of the present communication, which is addressed to the State party and not to the mother.

7.9 The State party also argues that there has been no violation of article 9 of the Convention. It states that the judicial authorities granted custody of the children to the mother and that both parents had the opportunity to participate in the legal proceedings in Spain; the right of the children to maintain personal relations and direct contact with both parents was thus respected. If this has not happened, it is because the father is not in Spain.

7.10 The State party also alleges that it has respected the right of the children and their parents to leave the country, in accordance with article 10 of the Convention. It adds that, in this case, these rights are the sole responsibility of the mother,

who has custody of the children and the right to decide on any foreign travel. The State party cannot order that the children travel to see their father, as that would constitute interference in the family domain. Lastly, the author is conflating obligations of a family nature with the obligations of States parties under the Convention.

7.11 The State party adds that the author's claims concerning the alleged violation of articles 11 and 35 of the Convention are simply "defamatory libel against Spain," and that there has been no violation of those articles.

7.12 The State party argues that L.H.L. and A.H.L. were heard and have expressed their views before the various courts in relation to the divorce and custody decisions. It adds that the children were also the subject of various psychosocial reports throughout the divorce proceedings.

7.13 The State party maintains that articles 18, 19 and 27 of the Convention have not been violated. It also argues that the judicial authorities have tried at all times to ensure compliance with those articles, for example through legal proceedings against the author for failure to pay maintenance for his children.

Author's comments on the State party's observations on admissibility and the merits

8.1 In his comments of 26 February, 2 March, 11 April, 17 May, 15 June and 2 August 2018, the author reiterates the facts and his allegations on the admissibility and merits of the communication. He claims that the State party's main argument that he is evading Spanish justice is an "absolute lie". He alleges that the mother knew that he was living in Ukraine when she filed a criminal complaint against him in Spain for non-payment of maintenance and that he had already provided evidence of his unemployment and medical leave to the Spanish court that decided on the divorce.

8.2 The author alleges that his ex-wife has political and church support in Spain and reiterates his accusations of corruption and prevarication in the Spanish justice system. He also reiterates that his requests for documents to the Court of Investigation pursuing the case for non-payment of maintenance were not granted and for that reason he did not submit his statement. He adds that on 20 August 2015 he notified the Court of Investigation of his address in Ukraine.

8.3 The author provides a copy of the decision of 15 May 2018 by Court of Investigation No. 6 of Zaragoza ordering the search for the author and the issuance of a European arrest warrant against him, in which it was indicated that he was residing in London. The author claims that this is evidence of reprisals against him by Spanish judges for the complaints that he brought against them before the General Council of the Spanish Judiciary. He adds that, as a result of the European arrest warrant, he lost his job in the United Kingdom. On 21 May 2018, the author appealed the decision of the Court of Investigation that issued the European arrest warrant. On 27 July 2018, the Provincial Court of Zaragoza rejected his appeal. The author claims that the denial of his appeal is also part of the reprisals taken against him by the judges of the Provincial Court.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, whether the communication is admissible.

9.2 The Committee notes the State party's arguments that the communication is inadmissible as it constitutes an abuse of the right to submit communications because the author does not have custody of his children and has not provided evidence that the children have consented to his submitting this communication to the Committee on their behalf, in accordance with article 7 (c) of the Optional Protocol (see paragraph 4.5). However, the Committee recalls that article 5 (2) of the Optional Protocol stipulates that a communication may be submitted without the consent of the alleged victims, provided that the author of the communication can justify acting on their behalf without their consent. The Committee considers that, even though the author does not have custody of his children, he has the right to represent them before the Committee, unless it is determined that he did not act in their best interests when submitting the communication. In this regard, the Committee considers that, based on the material contained in the communication, it does not appear that the submission of this claim by the author on behalf of his children L.H.L. and A.H.L. is contrary to their interests. The Committee also notes the author's allegations regarding the lack of direct contact with his children (see paragraph 2.17), which would have made it impossible for him to obtain their consent in any event. Consequently, the Committee considers that the communication is admissible under articles 5 (2) and 7 (c) of the Optional Protocol.

9.3 In relation to the author's allegations of violations of his own rights, the Committee considers that the Convention protects the rights of children and not of adults. The Committee therefore concludes that the author's claims made on his own behalf are incompatible with the provisions of the Convention and declares them inadmissible under article 7 (c) of the Optional Protocol.

9.4 Finally, the Committee notes the State party's argument that the communication is inadmissible under article 7 (f) of the Optional Protocol, as it is manifestly ill-founded. The Committee observes that, in 2009, the Court in Uster, Switzerland, granted custody of the children to their mother and extended access rights to the author, restricting the mother's right to leave Switzerland with her children; that on 4 December 2010, the mother took her children from Switzerland to Spain without the author's consent, which led him to request the return of his children to Switzerland under the Hague Convention on the Civil Aspects of International Child Abduction, and that, on 19 July 2011, Family Court of First Instance No. 6 of Zaragoza, Spain, declared the removal of the children from Switzerland to Spain unlawful and ordered that the author's children be returned to Switzerland. However, in October 2011, the Second Section of the Zaragoza Provincial Court ruled on appeal that the removal of the children was lawful and overturned the order for the children to be returned to Switzerland. The author appealed this decision to the Spanish Constitutional Court, which rejected the appeal. The Committee notes that, in May 2012, the El Escorial Court granted custody of the children to their mother and access rights to the author, ordering him to pay maintenance, and issued a final divorce settlement in similar terms in September 2013. However, the Committee also notes the author's claims that he was unable to exercise his access rights because of the State party's inaction and, in particular, the lack of a judicial response to his repeated requests for the El Escorial Court to execute and enforce the

decision of 8 May 2012. The State party claims that the foregoing situation arose because the author was outside the country in order to avoid paying maintenance for his children.

9.5 The Committee recalls that, as a general rule, it is for the national authorities to examine the facts and evidence and to interpret and enforce domestic law, unless their assessment has been clearly arbitrary or amounts to a denial of justice. It is therefore not for the Committee to take the place of the national authorities in assessing the facts of the case and the evidence but to ensure that their assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the child were a primary consideration in that assessment. In the present case, the Committee notes that the author's allegations concerning the alleged abduction of his children and the lack of contact with them were subject to a detailed analysis by the Spanish courts. The Committee considers that the author has not demonstrated that the judicial examination of facts and evidence by the various courts was clearly arbitrary or amounted to a denial of justice.

9.6 Consequently, the Committee finds that the communication has not been sufficiently substantiated and declares it inadmissible in accordance with article 7 (f) of the Optional Protocol.

10. The Committee on the Rights of the Child decides:

(a) That the communication is inadmissible under article 7 (f) of the Optional Protocol; and

(b) That this decision shall be transmitted to the author of the communication and, for information, to the State party.